Brief in Support of Petition.

First: The petitioners were deprived of the benefits of the provisions of the Fifth Amendment to the Constitution of the United States by the Federal Trade Commission in denying the petitioners a reasonable latitude in cross-examining the Commission's witnesses, Rusch and Leurele with respect to the only essential charge remaining in the bill of complaint, namely, whether the Segal cylinder is pickproof, or is not pickproof. In the attempt to prove its contention that the Segal cylinder is not pickproof, the Commission held the secret hearing by claiming privilege over the petitioners' objections. Since the sole issue in the case at bar is directed to the determination whether the Segal pickproof cylinder is pickproof or whether it is not pickproof, the right of cross-examination in respect to this material issue should not have been limited or abridged by a secret hearing on the part of the Commission under the guise of a trade secret, which has been proved by the petitioners by a preponderance of the evidence as *no trade secret at all.* The petitioners right to a *searching* cross-examination to test the ability of the government's witnesses, Rusch and Leurele was thus clearly prejudiced. *Alford* v. *United States,* 282 U. S. 687.

The issue here is not whether a door can be opened by the Commission's witnesses without the use of keys and without damage to the cylinder, or to the technique to that end. The issue is directed to the expression "pickproof" and not to the "openproof" characteristics of a door. Specifically the issue is whether the Segal cylinder can be picked successfully by "picking means". Petitioners were denied *to test this fundamental right on cross-examination.* Accordingly the Commission failed to establish the real truth by a secret hearing.

If the petitioners had been allowed to pursue this most proper line of cross-examination, the credibility of these

witnesses, Rusch and Leurele may have been completely destroyed, and different findings returned.

SECOND: The Federal Trade Commission exceeded its constitutional authority in relying on a secret hearing for shielding its witnesses, Rusch and Leurele, and in systematically limiting the petitioners' right to cross-examine these witnesses. This Court has stated in the case of the *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88, (middle p. 93)

> "* * * for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute."

The Commission relied on "privilege", namely, a trade secret to exclude the petitioners from having access to the tests by Rusch and Leurele, and arbitrarily and systematically restricted petitioners' cross-examination of these witnesses. Because of events that occurred at the secret hearing, the Commission held that the Segal cylinder is not pickproof. By such action, it is submitted that the Commission acted beyond its constitutional power for there was *no substantial evidence apart from the secret hearing to sustain the Commission's order to cease and desist.*

In fact the petitioners were denied the right to a *searching* cross-examination—for the best evidence offered on behalf of the Commission was cloaked in secrecy by the Commission under the guise of a trade secret.

Thus petitioners did not know what evidence was offered or considered and therefore could not test, refute or explain away what took place at the secret hearing instituted by the Commission.

The petitioners realize that the Commission's findings as to the facts "if supported by evidence, shall be con-

clusive" 15 USCA Section 45 (C). *Federal Trade Commission* v. *Standard Educational Society*, 302 U. S. 112. This provision, however, is interpreted as requiring *substantial evidence* as the basis of its findings in order to render them conclusive. *J. B. Lippencott Co.* v. *Federal Trade Commission*, 137 F. (2nd) 490, 491 (C.C.A. 3).

In the case at bar, Rusch and Leurele each on direct examination merely said that they successfully picked the petitioner's pickproof cylinder. But each on cross-examination refused to make an open demonstration in Court in the presence of the petitioners. The only evidence apart from the secret hearing is *mere self serving voluntary statements* by the Commission's witnesses. This is *no proof* of any evidentiary value.

Mere voluntary statements that one can successfully pick the Segal pickproof cylinder unless backed up by tests accessible to the petitioners do not amount to *bona fide* proof that the Segal cylinders *are not* pickproof. Nor would such statements or secret demonstrations characterize *bona fide* evidence in conflict with petitioners' evidence that the Segal pickproof cylinder in fact *is pickproof*. Thus *Benton Announcements* v. *Federal Trade Commission*, 130 (F. 2nd) 254, relied on by the Court below, does not apply in that it involved no secret hearing or serious limitations of cross-examination to preclude the determination of the real truth directed to the only issue in the case.

THIRD: The case presents an important question of Federal Law which has not been decided and should be decided by this Court, that is, whether a United States Administrative Bureau, such as the Federal Trade Commission, acting in the interest of the public as a prosecutor may under the guise of privilege rely on a secret hearing in which the petitioners and the public are excluded with respect to the sole and major issue in the case, and because

of such secret hearing, render findings resulting in confiscation of property of the petitioners without due process of law. The public importance of this question is obvious and its final determination is essential.

With its great resources at command and great choice of witnesses, the Federal Trade Commission should have called witnesses that could be subjected to a fair and searching examination without resort to a star chamber proceeding and without relying on the cloak of privilege.

In *Du Pont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100, cited by the Court below, plaintiff, the employer, sought to restrain the disclosure of a trade secret by the defendant, a former employee. Hence the defendant stood in confidential relationship with his former employer. This was purely a private affair for this is a question directed to an abuse of the trust reposed on the employee concerning a trade secret. This case is thus not in point. The case at bar clearly distinguishes from *Du Pont de Nemours Powder Co.* v. *Masland, supra*, for here, the Government *is the prosecutor* and has the burden of proving certain allegations of the bill of complaint but unjustifiably attempts to do so under the guise of a trade secret in a hearing which completely sealed off the petitioners, and the petitioners' counsel. There was no confidential relation between the petitioners and the Federal Trade Commission. In fact since the Commission in the interest of the public initiated the proceedings herein, it had the duty to prove its charge, openly and fairly with no strings attached or secret reservations.

FOURTH: The opinion of the Circuit Court of Appeals relative to the right of the petitioners to cross-examine the Government's witnesses, Rusch and Leurele is in direct conflict with prior decisions of the United States Supreme Court and of prior decisions rendered by the

United States Circuit Court of Appeals of other circuits. *Tla-Koo-Yel-Yee* v. *United States*, 167 U. S. 274; *The Ottawa* v. *Stewart*, 70 U. S. 268; *Farkas* v. *United States*, 2 (F. 2nd) 644, C.C.A. 6; *Furlong* v. *United States*, 10 (F. 2nd) 492 C.C.A. 8; *Alford* v. *United States*, 282 U. S. 687, and *Clark* v. *Federal Trade Commission*, 128 (F. 2nd) 542, C.C.A. (9). The bill of complaint charges that the Segal pickproof cylinder is not pickpoof. The Commission set out by a secret hearing to prove the only issue now in the case at bar. The petitioners were thus excluded from testing this issue. There was no opportunity to test the ability of the witnesses on cross-examination to identify the Commission's witnesses in their environment or reveal facts tending to discredit their testimony. Where a witness is called upon by the Government to prove an essential and material fact, charged in the bill of complaint, testimony to such fact *must be disclosed*, where it is essential and material to the ascertainment of the truth, even though a trade secret may be involved. For the very purpose of cross-examination is to test the accuracy of the witnesses. Wigmore Evidence, 3rd Ed., Vol. 8 (§22212), referred to by the Court below announces the general rule with respect to disclosure of a trade secret:

> "Finally even where the claimant of the privilege is not a party charged with fraud, *no privilege of secrecy should be recognized* if the rights of possibly innocent persons depend *essentially or chiefly* for the ascertainment upon the disclosure in question.
>
> In short the privilege should be conceded in those cases *only* where the disclosure of the facts by the particular channel of the witness in question is but a *subordinate means* of proof relative to the other evidence available in the case; for without such limitation the general principle can-

not be enforced, that *testimonial duty to the community is paramount to private interest* and no man is to be denied his rights merely because another possess the facts without which the right cannot be ascertained and enforced."

In other words, no privilege of secrecy attaches where the rights of innocent persons depend *essentially and chiefly* upon disclosure for the ascertainment of the truth. Privilege attaches where the disclosure of the trade secret is but a *subordinate means of proof* in the light of other evidence available. In the case at bar, the rights of the petitioners *depends upon disclosure* of the so-called trade secret. For it is the only issue. In fact the revelation of a trade secret was insisted upon by the Federal Trade Commission in *Clark* v. *Federal Trade Commission, supra,* wherein the Circuit Court affirmed the decision* of the District Court which held that a *trade secret must be disclosed* because the question was *material,* and *because the present tendency of the law is to require a person to answer questions that are necessary to be answered in ascertaining the truth especially where the government through the Federal Trade Commission is acting in the interest of the public.*

In the case at bar, the Federal Trade Commission although having the burden of proof to sustain the charge of the bill of complaint, attempted to satisfy such burden by interposing a self styled trade secret *behind sealed doors* to the exclusion of the petitioners even though the *whole case depended chiefly* and *solely on disclosure for the ascertainment of the truth to warrant a fair trial.*

FIFTH: The denial of reasonable latitude in cross-examining a witness is prejudicial error. In *Alford* v.

*The proceedings before the District Court are in part set out on page 262, lines 7-11, penultimate paragraph, Federal Trade and Law Practice by Henry W. Beer, 1942 Edition.

United States, 282 U. S. 687, 694, the cross-examination was limited over the objection of counsel, this Court held:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the Trial Court. It may exercise a reasonable judgment in determining when the *subject is exhausted. Storm* v. *United States*, 94 U. S. 76, 85; *Rea* v. *Missouri*, 17 Wall. 532, 542-543; *Blitz* v. *United States*, 153 U. S. 308, 312. * * * The Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In the case at bar, there was no opportunity to place the Government's witnesses in their proper setting and put the weight and credibility of these witnesses to proper test. Petitioners were denied a full cross-examination *to exhaust* such cross-examination. Thus one of the safeguards essential to a fair trial was denied the petitioners.

As a further indication of the arbitrary manner in which the hearing before the Federal Trade Commission was conducted, attention is respectfully directed to the fact that on re-direct examination of the witness Rusch, the attorney for the Commission *opened the door for a full cross-examination* but the Trial Examiner insisted that the Commission decide the question. For example, on redirect, Government counsel asked Rusch R. 311, 312, fols. 933, 934:

> Q. "I will ask you did you use a pick to open the Segal pickproof cylinder?
>
> A. Yes, we used a pick to pick the cylinder open."

Mr. Palmer:

> "I maintain that opens the door in respect to all these questions that we have consolidated, the witness has definitely committed himself that the pick he has been using was a certain type, and we have a right to inquire what type of pick it was."

Trial Examiner Addison:

> "That certainly sounds quite plausible, but there is no way we can properly introduce it now, in my opinion. The Commission will have to pass on that question."

On re-cross, since Rusch designated on re-direct that he used a pick, he was asked (R. p. 313, fols. 938, 939):

> Q. "Will you describe the pick that you used in picking the particular Segal pick-proof lock?"

Mr. Baughman:

> "I object."

Trial Examiner Addison:

> "Same ruling. Objection sustained, exception noted."

Mr. Palmer:

> "Now, I think the Government's attorney has opened the door, to a complete disclosure on the part of this witness. He has testified, and he has specified directly on the rebuttal* examination that he used the pick. We have a right to inquire what kind of a thing it was and to call for the production of this particular pick."

*Re-direct.

Trial Examiner Addison:

> "I have conceded the plausibility of that argument, but I would rather have the Commission pass on it."

The Commission instead of granting the petitioners the right to an exhaustive cross-examination relied on the secret hearing even though the Government attorney opened the door for a full cross-examination. The Commission's order to cease and desist therefore is confiscatory, arbitrary, and unwarranted since its decision which has been sustained by the Court below is based on *no substantial evidence*.

The Supreme Court of the United States has set down the following proposition of law in *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U. S. 88 (at pp. 91, 92):

> " • • • the right to a full hearing and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean the Commission had a power possessed by no other administrative body, or tribunal under our Government. It would mean that where the rights depend upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority however beneficially exercised in one case could be injuriously exercised in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power. • • •
>
> In a case like the one at bar, the Court will not review the Commission's conclusions of fact • • •

by passing upon the credibility of the witnesses or in the conflicts of testimony. But the legal effect of evidence is a question of law. *A finding without evidence is beyond the power of the Commission.* An order based thereon is contrary to law and must in the language of the statute 'be set aside by a Court of competent jurisdiction'."

SIXTH: That each of the matters passed upon in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way untenable and in conflict with the weight of authority. The chief value and purpose of cross-examination is to test and, if the circumstances warrant it, to destroy the credibility of a witness. This is accomplished by discrediting the witnesses.

The Supreme Court of the United States has laid down the rule as follows:

> "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief; and the time and place when and where they occurred, and the attending circumstances; and of testing the intelligence, memory, impartiality, truthfulness and integrity of the witness." *The Ottawa* v. *Stewart*, 70 U. S. 268, 271.

Jones in his Commentary on the Law of Evidence (2nd Ed.), Volume 5, Section 2345, announces the rule as follows:

> "The party who produces a witness vouches for his credibility, but the cross-examiner sustains

> no such relation to the witness and has full liberty to test his credibility. For the purposes of testing the credibility of a witness it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclinations and his prejudices."

Further on in the same section *Jones* states:

> "It is said that a witness may be asked any questions which tend to test his *accuracy*, veracity or credibility or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosyncrasies may be revelant."

The opinion of the Circuit Court of Appeals below should not be allowed to stand as a future guidance and precedent, for apart from laying down erroneous rules of law, it also does so in direct conflict with prior decisions of long standing, denying petitioners the benefits of the Fifth Amendment of the Constitution.

It is believed that the foregoing demonstrates that if the rulings of the opinion below are not set aside, petitioners' right of cross-examination of adverse witnesses, one of the most valuable rights for the establishment of the truth will be curtailed and abridged; petitioners will be charged and tried by offenses as formulated by the Federal Trade Commission and by government attorneys and not as found; and petitioners will be deprived of a fair and impartial trial in accordance with our established rules of procedure guaranteed by our Constitution, and the laws and decisions of our Courts.

For reasons urged petitioners respectfully pray that this Honorable Court issue a writ of certiorari to the

United States Circuit Court of Appeals for the Second Circuit to the end that the questions involved may be fully presented and argued and justice be done in the premises.

Dated, Washington, D. C., November 6, 1944.

CHARLES M. PALMER,
Counsel for Petitioners.

Certificate of Counsel.

I HEREBY CERTIFY that I am counsel for the petitioners in the above identified cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and said petition is not interposed for purposes of delay.

CHARLES M. PALMER,
Counsel for Petitioners.

Dated, Washington, D. C., November 6, 1944.